

No. 6540

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

In the Matter of

ROUTT LUMBER COMPANY (a corporation),
Bankrupt.

STANDARD PLANING MILL (a corporation),
Appellant,

vs.

PACIFIC COAST PAPER COMPANY, PACIFIC
PORTLAND CEMENT COMPANY, SLOSS &
BRITAIN, and A. HOLM, assignee of Red-
wood Manufacturers Company, WEND-
LING-NATHAN COMPANY and SUGAR PINE
LUMBER COMPANY, LTD.,

Appellees.

APPELLEES' PETITION FOR A REHEARING.

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FILED

JUN 29 1932

PAUL P. O'BRIEN,

CLERK

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Since the preparation of this petition, the Superior Court of Fresno County, after a full trial of the issues which were presented to the District Court on affidavits, and particularly the issue of alter ego, has decided on the evidence, oral and documentary, that the Routt Lumber Company and the Standard Planing Mill are one and the same corporation and the business conduit one of the other.

While we realize that such decision is not binding upon this Court or upon the United States District Court, nevertheless we feel that it should be called to this Court's attention for the reason that the evidence before this Court was solely by affidavits, and many of the facts therein alleged have been shown to be entirely without foundation in truth or in fact when oral testimony was taken in the trial before the Superior Court of Fresno County.

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APPELLEES' PETITION FOR A REHEARING.

*To the Honorable Curtis D. Wilbur, Presiding
Judge, and to the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

This is a petition for rehearing, this Court having reversed the judgment of the Court below, in favor of

the appellees herein, upon the ground that the order of the Court below was predicated upon the erroneous proposition that the two corporations herein involved were substantially the same.

In so basing its decision this Court has seemingly overlooked the recognized rule that it is *judicial action* and *not judicial reasoning* with which appellate Courts are concerned. In other words, the rule stated is that the appellate Court will affirm the order of the lower Court if it finds *any ground* upon which the order may be sustained.

We feel and respectfully urge in this petition that there were other grounds upon which the order of the District Court could have been upheld.

In this petition we urge the following points:

1. That irrespective of any theory of alter ego, the Court below had jurisdiction to extend the receivership of the Routt Lumber Company to cover the property and assets of the Standard Planing Mill, *and that such order was not an adjudication of title.*

2. That this order was absolutely necessary for the preservation of the bankrupt's estate to the creditors.

3. That the stock ownership of the appellant herein was not "diverse."

4. That the evidence establishes that the Standard Planing Mill was a mere agent or department of the Routt Lumber Company.

1.

THAT IRRESPECTIVE OF ANY THEORY OF ALTER EGO, THE COURT BELOW HAD JURISDICTION TO EXTEND THE RECEIVERSHIP OF THE ROUTH LUMBER COMPANY TO COVER THE PROPERTY AND ASSETS OF THE STANDARD PLANING MILL, AND THAT SUCH ORDER WAS NOT AN ADJUDICATION TO TITLE.

It should be here noted that the Routh Lumber Company is in the hands of a Receiver, *has not been adjudicated a bankrupt* (although a Petition in Involuntary Bankruptcy was filed on *April 8, 1931*), and that consequently no Trustee has been appointed.

We respectfully submit that this state of facts is entirely different from the state of facts which was before the Circuit Court of Appeals of the Third Circuit in the *Looschen Piano Company* case, 266 Fed. 359. In that case title to property was sought to be determined without the necessity of a plenary suit, *but the Looschen Company had already been adjudged a bankrupt.*

Section 2 of the Bankruptcy Act of 1898 clearly confers upon the District Court the authority to appoint Receivers to take charge of the property of a bankrupt when they "shall find it absolutely necessary for the preservation of estates" and until the petition is dismissed "or the Trustee is qualified."

The language of the Court in *In re Knopf*, 144 Fed. 245, in speaking of this section, is particularly pertinent:

"The precise question presented for determination is whether the Bankruptcy Court can by a summary proceeding seize property not in the possession of the bankrupt or whether it was nec-

essary for that Court *to wait until a Trustee was appointed* and then direct such Trustee by a plenary proceeding to proceed to recover the same * * *.

“The result of my examination of the cases is that, wherever it appears that it is *necessary for the preservation of the property* claimed to be a part of the bankrupt’s estate, after Petition in Bankruptcy has been filed, that the Court should take possession of the same, *pending the adjudication of title*, it is within the jurisdiction of the Court to order the marshal or a custodian to take possession of the property * * * *That the object of the bankrupt law* which is to have the property of the bankrupt equally distributed among his creditors, *would be entirely defeated, if in such a case the Court was compelled to wait for the appointment of a Trustee to bring a suit to recover such property, for by the time such suit could be determined the property in the hands of an irresponsible person might be entirely dissipated.*” (Italics ours.)

The Supreme Court in the case of *Sharpe v. Doyle*, 102 U. S. 689, 26 L. Ed. 277, speaking through Justice Miller, states the law as follows:

“The act of Congress was designed to secure the possession of the property of the bankrupt so that it might be administered under proceedings in Bankruptcy. *Between the first steps initiating them and the appointment of the assignee a considerable time often elapses, during which the effects of the bankrupt, especially in a case commenced by creditors, may be surreptitiously conveyed beyond the reach of the Court or of the assignee, who when appointed is entitled*

to possession of them * * * The evidence in this case shows the manner in which this can be done. It was the purpose of the act of Congress to remedy this evil. It therefore provides that, as soon as the Petition in Bankruptcy is filed, the Court may issue to the marshal a provisional warrant directing him to take possession of all the property and effects of the bankrupt and hold them subject to further order of the Court. To have limited this right or duty of seizure to such property as he might find in the actual possession of the bankrupt would have manifestly defeated in many instances the purposes of the Writ. There is therefore no such limitation expressed or implied." (Italics ours.)

See also

- In Re Young* (C. C. A., 7th), 111 Fed. 283;
Feibelman v. Packard, 109 U. S. 421, 27 L. Ed. 984;
Bryan v. Bernheimer, 181 U. S. 188, 45 L. Ed. 814.

In other words, the District Court sitting as a Court of Bankruptcy has jurisdiction, when in its discretion it deems it necessary, to appoint a receiver, *but such appointment does not adjudicate title.*

- In re Moody*, 131 Fed. 525;
Horner Gaylord Co. v. Miller & Bennett, 147 Fed. 295;
In re Haupt Bros., 153 Fed. 239;
In re Knopf, supra.

The extension of the receivership, therefore, by the District Court was not necessarily predicated upon the erroneous, or any, theory that the two corporations

were practically identical, and should so be treated in the administration of the affairs of the bankrupt, but rather was predicated upon its finding *that such extension of receivership was absolutely necessary for the preservation of the bankrupt's estate.*

A reference to the prayer of the petition on which the order was based should be conclusive as to the extent of the order of the District Court in extending this receivership. *The appellees herein did not request an adjudication of title, nor could the order of the District Court on that petition be interpreted so as to adjudicate title to any of the property of the Standard Planing Mill.*

The petition requested three alternatives as follows:

1. That the receivership of the Routt Lumber Company be extended over the property of the Standard Planing Mill *until a Trustee was appointed or until further order of Court.*

2. That the Standard Planing Mill be enjoined of disposing of its assets or of collecting its assets *until the appointment of a Trustee in Bankruptcy for the Routt Lumber Company.*

3. That the Receiver of the Routt Lumber Company be given authority to sue the Standard Planing Mill for the recovery of assets belonging to the Routt Lumber Company.

Under this state of facts it is respectfully submitted that the District Court had and acted within its jurisdiction irrespective of any theory of alter ego.

2.

THAT THIS ORDER WAS ABSOLUTELY NECESSARY FOR THE PRESERVATION OF THE BANKRUPT'S ESTATE TO THE CREDITORS.

The attention of this Honorable Court is directed to the allegations contained in paragraphs VI and VII of the Petition to Extend Receivership found on pages 40 and 41 of the transcript.

For the convenience of the Court these paragraphs are hereinbelow set forth:

VI.

“That A. Holm, one of your petitioners herein, has sued the Routt Lumber Company and the Standard Planing Mill and attached the properties and assets of the Routt Lumber Company and the Standard Planing Mill; that in said suit under a Writ of Attachment the sheriff of Fresno County has been and now is in possession of the properties of the Standard Planing Mill since March 20, 1931; *that the sheriff's possession as aforesaid is for the benefit of all the creditors of the Routt Lumber Company and the Standard Planing Mill*; that said A. Holm has been forced to expend the sum of five dollars (\$5.00) a day since March 20, 1931, to preserve these assets for the benefit of said creditors.

VII.

“That on or about the 1st day of April, 1931, one L. W. Ellis, assignee of Orville Routt, brother of Leonard and Virgil Routt, the officers of the Standard Planing Mill and the Routt Lumber Company, commenced a suit against the Standard Planing Mill for some \$8500.00 and was permitted

to obtain a default judgment in said suit; that thereafter the Sheriff of Fresno County, under Writ of Execution in said suit attempted to sell certain personal property of the Standard Planing Mill; that the officers and attorney for the Standard Planing Mill encouraged the Sheriff in making such sale and appeared in Court and filed affidavits to so assist the Sheriff; that said Sale by the Sheriff has been temporarily held up by an order of the Supreme Court of the State of California.”

Attention is also called to paragraph XII of the Affidavit of C. W. Krumbholz set forth on pages 59 and 60 of the transcript of record reading as follows:

“12. That Leonard Routt, the Vice-President of the Routt Lumber Company, and the Vice-President of the Standard Planing Mill, and Director of both companies, has had access to the books of the Standard Planing Mill and has, on numerous occasions, examined the books of account, and ledgers of the Standard Planing Mill, particularly their accounts receivable; that a great many of the accounts receivable of the Standard Planing Mill have been collected by the Sheriff of the County of Fresno under a Writ of Execution issued in the suit of J. W. Ellis (assignee of Orville Routt) v. Standard Planing Mill, and applied to his judgment after the examinations made by Leonard Routt as aforesaid.”

With these two undisputed factors before the District Court it is respectfully submitted that the District Court was not only justified, but would have erred, had it made any contrary ruling.

In other words, the situation placed before the District Court was simply that it was impossible at that time (June, 1931) to proceed against the Standard Planing Mill until the October term of the District Court in Fresno, at which time the trial of the Routt Lumber Company's bankruptcy was expected to be had. We here note that this situation is unchanged at this time and *that the Routt Lumber Company has not been adjudicated a bankrupt, nor can trial be had prior to the October, 1932, term of the United States District Court sitting in Fresno.*

It was squarely placed before the Court that A. Holm, one of the appellees herein, had expended the sum of \$5.00 a day in sheriff's keepers' fees from March 20, 1931, to June 5, 1931, and would continue to expend that sum for the benefit of all creditors of the Routt Lumber Company and Standard Planing Mill until an adjudication of title could be had.

Consequently, and under the Bankruptcy law, if the petitioning creditors were successful in their contention that substantially all of the property belonged to the Routt Lumber Company, then and in that event the estate of the bankrupt would be depleted by the sum of \$5.00 a day for over a year and a half, since such keepers' fees would be a preferred claim in bankruptcy.

The District Court, therefore, was faced on the one hand with the fact that if the attachment continued it would react to the *detriment of the estate*, and on the other hand with the fact that if the attaching creditor withdrew the sheriff's keeper *all of the property* of the Standard Planing Mill would, *without giving the*

creditors an opportunity to be heard, be used to pay the judgment obtained by Ellis, assignee of Orville Routt.

We respectfully request this Court to consider the factors moving the District Court to extend receivership upon the grounds that *it was absolutely necessary for the preservation of the estate of the bankrupt*:

1. The assured delay before a Trustee in bankruptcy could be appointed.

2. The prohibitive cost of preserving the property of the Standard Planing Mill under attachment.

3. The suit by Orville Routt and the fact that an officer of the Standard Planing Mill (also an officer of the Routt Lumber Company) was endeavoring to assist in the collection of the judgment obtained by default therein *to the detriment of the creditors*.

4. The fact that it was impossible to ascertain what property of the Standard Planing Mill belonged to the Routt Lumber Company in view of the following facts:

(a) The commingling of the assets of both companies on the property of the alleged bankrupt and their impossibility of segregation as is pointed out by an officer of this Court in the affidavit of C. W. Krumbholz, Receiver herein, and verified by Oliver M. Weed, a certified public accountant against which we have only the affidavit of the employee, A. Callahan, and the affidavit of Leonard Routt, an officer of

both companies, and who admittedly is assisting his brother, Orville Routt, to the detriment of other creditors.

(b) The undisputed evidence that the Routt Lumber Company paid all insurance and office expense.

(c) The confusing and misleading entries in the books of both companies.

(d) The close association between the two companies.

(e) The other evidence as set out in this Court's opinion, disputed and undisputed as the case may be.

(f) The undisputed evidence of the transfers by the Routt Lumber Company of the accounts receivable and truck to the Standard Planing Mill.

(g) The identity of officers and the interlocking directors.

(h) The fact that the Standard Planing Mill claimed *all* the property.

It is respectfully submitted that the order of the District Court was absolutely necessary for the preservation of the estate.

3.

THAT THE STOCK OWNERSHIP OF THE APPELLANT HEREIN WAS NOT "DIVERSE".

In its opinion, this Court states as follows:

“No case has been cited and we have found none in which two corporations have been treated

as identical where the ownership of the stock was as diverse as in the case at bar.”

Prior to this statement the Court states:

“It will be observed in passing that the Petition alleges that $\frac{1}{3}$ of the stock of the Standard Planing Mill is outstanding in the name of M. D. Bishop and that the Routt Lumber Company had transferred the remaining $\frac{2}{3}$ of the stock before the Petition in Bankruptcy had been filed.”

Attention is directed to the fact that the Petition of Involuntary Bankruptcy was filed on *April 8, 1931*, and that the alleged transfers of its $\frac{2}{3}$ ownership of the capital stock of the Standard Planing Mill was made by the Routt Lumber Company to W. E. Opie and Builders' Finance on *March 3, 1931*, a little more than one month prior to the filing of this involuntary petition.

Attention is also called to the fact that on *April 30, 1931*, an amended petition was filed in which the allegation is made that the *transfer by the Routt Lumber Company on March 3, 1931, to W. E. Opie and Builders' Finance are acts of Bankruptcy.*

Attention is also called to the Affidavit of William T. Doyle, paragraph 4, page 15 of the transcript, reading as follows:

“That on or about the 7th day of February, 1931, the Routt Lumber Company had in its possession the certificate evidencing its ownership of 24,600 shares of the Standard Planing Mill's stock and your affiant saw these certificates in the possession of the receiver herein on April 22, 1931.”

The Affidavit of C. W. Krumbholz, as Receiver, under date of April 22, 1931, states that he has in his possession the certificates of stock of the Standard Planing Mill, totalling 24,600 shares and standing in the name of the Routt Lumber Company.

The Affidavit of Leonard Routt under date of April 23, 1931, states that the stock transfers have not been made on the books of the company for the reason that the books have not been available, but are in the possession of the Receiver in Bankruptcy. This Affidavit is entitled to *no credence* when read in connection with the Affidavit of Melbourne Routt wherein he states that the sale of the Standard Planing Mill stock by the Routt Lumber Company was consummated on March 3, 1931, and when we consider the fact that the Receiver was not appointed until April 14, 1931.

It is surprising that the undisputed record shows that on February 7, 1931, the Routt Lumber Company had in its possession the 24,600 shares of the Standard Planing Mill stock, although the sale was not consummated until March 3, 1931, and it is more surprising that the transfer was not made prior to the appointment of the Receiver on April 14, 1931.

In other words, the Routt Lumber Company had the 24,600 shares *in its possession three weeks before the alleged sale* and for a period of *over six weeks after the alleged sale*.

It is clear, therefore, that the only stockholders of the Standard Planing Mill were and are the Routt Lumber Company, the alleged bankrupt, owning $\frac{2}{3}$ of its capital stock, and M. D. Bishop, owning $\frac{1}{3}$ of its capital stock.

The stock ownership of the Standard Planing Mill was divided between two parties only, namely the Routt Lumber Company and Bishop.

In *In re Muncie Pulp Company*, 139 Fed. 546 (C. C. A., 2nd), there were but two stockholders, one holding a bare majority of 53% and the other holding 47% of the stock, and the Circuit Court upheld the extension in a summary proceeding. Here we are requesting an extension of receivership for a limited period only, in order that the issues may be tried in a plenary suit, when a trustee is appointed.

In *In re Eilers Music House*, 270 Fed. 915 (C. C. A., 9th) (certiorari denied, 257 U. S. 646, 66 L. Ed. 414), this Court upheld the District Court in an order extending receivership of one corporation over the assets of another, under a state of facts analogous to the case at bar.

4.

THAT THE EVIDENCE ESTABLISHES THAT THE STANDARD PLANING MILL WAS A MERE AGENT OR DEPARTMENT OF THE ROUTT LUMBER COMPANY.

A summary of the evidence discloses the following facts:

The officers of both companies were as follows:

ROUTT LUMBER COMPANY		STANDARD PLANING MILL
Hiram Routt	President	Leonard Routt
Virgil Routt	Vice-President	Virgil Routt
Leonard Routt	Secretary	Leonard Routt
Leonard Routt	Treasurer	Virgil Routt

As hereinabove set forth, the Routt Lumber Company was the owner and holder of 24,600 shares of the capital stock of the Standard Planing Mill, being $\frac{2}{3}$ of the entire issued and outstanding shares, and was purchasing from M. D. Bishop the remaining $\frac{1}{3}$ of the stock.

With reference to the manner of keeping the books and records, we have on the one hand the Affidavit of Oliver M. Weed, a certified public accountant, and on the other hand the Affidavit of H. W. Hills, also a certified public accountant.

An examination of the Affidavits of both of these men discloses that H. W. Hills simply states that the two companies maintained a distinct and separate set of books (which fact is conceded by appellees herein); that he has prepared State Franchise reports and Federal Income Tax reports made up from the *book entries* of each individual corporation.

It is concededly a simple matter to prepare Tax Returns from book entries; it is not stated that Hills made an audit of both companies; the inference is that he simply prepared returns from the book entries.

On the other hand, the Affidavit of Oliver M. Weed states

“That an examination has been made * * * of the books of the Routt Lumber Company and of the Standard Planing Mill”;

that he has gone behind the book entries, which book entries are merely self-serving declarations binding neither on the company or on the appellees herein; that the entries in the books of the Routt Lumber

Company and of the Standard Planing Mill are themselves confusing and misleading.

It is to be here noted also that no reference is made by H. W. Hills as to the insolvency or solvency of the Routt Lumber Company, whereas the Affidavit of Oliver M. Weed after an audit shows that it was insolvent at the time it made the transfers and purchases specifically referred to in this Court's decision.

As to the method of conducting the business:

The evidence clearly shows that from the time of the fire at the office of the Standard Planing Mill in 1928 until December 15, 1930, that the Standard Planing Mill did not operate a retail business. (Affidavit of Leonard Routt, R. 25.)

The evidence also shows that the Standard Planing Mill during this period operated a sawmill and cut and sawed lumber and delivered the same to the Routt Lumber Company in Fresno. (R. 65.)

The evidence shows that the Routt Lumber Company retailed the lumber of the Standard Planing Mill in its yards in Fresno. (R. 65.)

The evidence also shows that on or about the date the Standard Planing Mill, according to the Affidavit of Leonard Routt, started business, the Routt Lumber Company transferred to the Standard Planing Mill accounts and notes receivable in the sum of \$6224.00. (R. 37.)

The evidence also shows that the Standard Planing Mill did not pay, nor was it assessed for, personal property taxes from the time of the fire in 1928 to and including April, 1931. (R. 36.)

The evidence also shows that during this period the Routt Lumber Company paid all operating expense of the Standard Planing Mill. (R. 58.)

The evidence also shows that the Standard Planing Mill actually occupied the same office as the Routt Lumber Company, had the same telephone number, and never paid for either privilege. (R. 36, 58.)

It is clear that the Standard Planing Mill, even if it was maintained as a separate corporation prior to September, 1928, has nevertheless since that date been used merely as a business adjunct or department of the Routt Lumber Company.

We therefore submit that the United States District Court had jurisdiction to extend the receivership upon the grounds that it was absolutely necessary for the preservation of the estate of the bankrupt irrespective of any theory of alter ego.

For these reasons a rehearing of this case is respectfully asked.

Dated, San Francisco,
June 29, 1932.

Respectfully submitted,

WILLIAM T. DOYLE,

*Attorney for Appellees
and Petitioners.*

WILLIAM J. HAYES,
GRANT H. WREN,
Of Counsel.

CERTIFICATE OF COUNSEL.

The undersigned hereby certifies that he is of counsel for appellees and petitioner in the above entitled cause and that in his judgment the foregoing Petition for a Rehearing is well founded in point of law as well as in fact, and is not interposed for delay.

Dated, San Francisco,
June 29, 1932.

WILLIAM T. DOYLE,
*Of Counsel for Appellees
and Petitioners.*